

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of )

HAWAIIAN ELECTRIC COMPANY, INC. )

For Approval of Rate Increases and Revised )  
Rate Schedules and Rules )  
\_\_\_\_\_ )

DOCKET NO. 2008-0083

PUBLIC UTILITIES  
COMMISSION

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**MEMORANDUM IN OPPOSITION TO THE MOTION TO INTERVENE AND  
BECOME A PARTY OF WAL-MART STORES, INC. AND SAM'S WEST, INC.,  
AND MOTION TO APPEAR ON BEHALF OF WAL-MART STORES, INC. AND  
SAM'S WEST, INC.**

**AND**

**CERTIFICATE OF SERVICE**

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AND MOTION TO APPEAR ON BEHALF OF WAL-MART STORES, INC. AND  
SAM'S WEST, INC.**

This Memorandum is respectfully submitted by HAWAIIAN ELECTRIC COMPANY, INC. ("HECO") in opposition to the Motion to Intervene and Become a Party ("Motion") of Wal-Mart Stores, Inc. and Sam's West, Inc. (collectively "Wal-Mart") and Motion to Appear on Behalf of Wal-Mart, both dated August 20, 2008.<sup>1</sup>

HECO opposes Wal-Mart's motion to intervene as a party because Wal-Mart has failed to meet the standard for intervention as a party set forth in H.A.R. §6-61-55. Specifically, Wal-Mart has failed to demonstrate that (1) the very general interest that it alleges it has in this proceeding will not be adequately represented by the Consumer Advocate; (2) Wal-Mart's intervention as a party will contribute in any significant way to

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<sup>1</sup> Wal-Mart's Motions were filed on August 20, 2008 and its certificates of service indicate that it served on HECO via U.S. Mail on August 20, 2008. H.A.R. §6-61-41(c) states that an opposing party may serve and file counter affidavits and a written statement of reasons in opposition to the motion and of the authorities relied upon not later than five days after being served the motion. H.A.R. §6-61-22 states that when the prescribed time is less than seven days, Saturdays, Sundays, and holidays within the designated period shall be excluded in the computation. When the service is by mail, H.A.R. §6-61-21(e) allows for the addition of two days to the prescribed period. Therefore, the due date for the Company's memorandum in opposition to Wal-Mart's Motions is August 29, 2008. Accordingly, this Memorandum in Opposition is timely filed.

the development of a sound record regarding the reasonableness of HECO's proposed rate increase; and (3) Wal-Mart's intervention as a party would not unduly delay the proceedings and unreasonably broaden the issues presented in this docket.

The Hawaii Supreme Court has made clear that intervention as a party to a proceeding before the Commission "is not a matter of right but is a matter resting within the sound discretion of the Commission."<sup>2</sup> Furthermore, the requirements of H.A.R. §6-61-55(d) are exacting: "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." (Emphasis supplied).<sup>3</sup> Consequently, where a movant has not met its burden under H.A.R. §6-61-55(d), intervention as a party "shall not be granted."

Through its Motion, Wal-Mart alleges that it is a "large retailer with five facilities" in HECO's service territory. (Motion at 2) Wal-Mart also generally alleges that it has a "substantial and vital interest in the outcome of this proceeding that cannot be represented by any other party." (Id.) Wal-Mart does not attempt to detail in any way the reasons why the Consumer Advocate will not adequately represent Wal-Mart's interests as the Consumer Advocate does for all other large retailers and customers of the utility pursuant to State law. Additionally, Wal-Mart does not even allege that its intervention will not "unreasonably broaden the issues already presented" in the docket. Instead, Wal-Mart contends that "[i]t is not unlikely that Wal-Mart's position may be different from those advocated by HECO, the Consumer Advocate, or any other party to

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<sup>2</sup> In re Hawaiian Electric Co., 56 Haw. 260, 262, 535 P.2d 1102 (1975); see Re Maui Electric Co., Docket No. 7000, Decision and Order No. 11668 (June 5, 1992) at 8; Re Hawaii Electric Light Co. Docket No. 6432, Order No. 10399 (November 24, 1989) at 5-6.

<sup>3</sup> Re Hawaii Electric Light Co., Docket No. 7259, Order No. 12893 (December 2, 1993).

the instant proceeding” (Motion at 3) without describing in any detail what those positions may be. Furthermore, Wal-Mart has not provided the Commission with sufficient facts and information to determine that Wal-Mart has any special knowledge or expertise in the area of utility revenues, expenses, rate base and rate of return, and reasonableness of the proposed rate increase such that its participation will “contribute to the production of complete and accurate discovery and to the development of a sound record.” (Id.) Finally, Wal-Mart does not offer the Commission any evidence to support its contention that its participation “will enable the Commission to view and consider more relevant and pertinent information” than the Commission would otherwise receive absent Wal-Mart’s participation.

In summary, Wal-Mart has not met the standard for intervention as a party in this proceeding as set forth in the Commission’s Rules of Practice and Procedure and the well established Commission and State law precedent addressing this issue.<sup>4</sup> Therefore, Wal-Mart’s Motion and associated Motion to Appear should be denied.

## **I. DISCUSSION**

The general rule with respect to intervention, as stated by the Hawaii Supreme Court, is that intervention as a party to a proceeding before the Commission “is not a matter of right but is a matter resting within the sound discretion of the Commission.” The Commission exercises its discretion by determining whether or not a movant should be admitted as a party in a proceeding pursuant to H.A.R. §6-61-55. H.A.R. §6-61-55(d) specifically states that: “Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.”

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<sup>4</sup> Title 6, Chapter 61 of the Hawaii Administrative Rules (“H.A.R.”) is referred to as the “Commission’s Rules of Practice and Procedure.”

Re Hawaii Electric Light Co., Docket No. 7259, Order No. 12893 (December 2, 1993).

Wal-Mart has failed to meet the well-established standard for intervention as a party in a Commission proceeding and accordingly, its Motion should be denied.

**A. Wal-Mart's Interests with Respect to HECO's General Rate Increase Request Can Be Adequately Represented by the Consumer Advocate.**

H.A.R. §6-61-55(b)(5) requires Wal-Mart to establish "the extent to which the applicant's interest will not be represented by the existing parties." H.A.R. §6-61-55(b)(8) requires Wal-Mart to establish "the extent to which applicant's interest in the proceeding differs from that of the general public." Wal-Mart attempts to meet the Commission's requirements with two unsupported contentions: (1) Wal-Mart's interests "cannot be adequately represented by any other party" (Motion at 2); and (2) Wal-Mart's position in this proceeding "may be different from those advocated by HECO, the Consumer Advocate, or any other party...." (Motion at 3). Wal-Mart's Motion does not expand upon or support these claims or attempt to demonstrate that its interests are somehow different from the large customer interests already represented by the Consumer Advocate in this proceeding. This is likely because Wal-Mart's interest in general rate case issues (revenues, expenses, rate base, rate of return, and cost of service) is generally the same as that of the general public.<sup>5</sup>

The Consumer Advocate is required under the Hawaii Revised Statutes to "represent, protect, and advance the interest of all consumers." H.R.S. §269-51

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<sup>5</sup> This is different from the DOD which regularly participates in Commission dockets related to rate increases and rate design. Moreover, the DOD has asserted in these proceedings that it has a "crucial and strategic interest in securing electricity at the lowest but fair cost" and that its intervention serves the public interest in that "it expends funds on behalf of the taxpayers of the United States in furtherance of the goals and objectives of the federal government." Based upon these demonstrations, the Commission has found that issues relating to the reasonableness of rates "appear to be crucial to the national defense interests represented by DOD" and that the DOD has "substantial interests that are reasonably pertinent" to rate case issues such as those present here. (Order No. 23366 in Docket No. 2006-0386 at 5)

(emphasis supplied). H.R.S. §269-54(b)(7) enforces this requirement by providing the Consumer Advocate with the express authority to “[r]epresent the interests of consumers of utility services before any state or federal agency or instrumentality having jurisdiction over matters which affect those interests.” The relief which HECO requests in this proceeding affects the public in general and Wal-Mart is not uniquely affected. Thus, Wal-Mart’s interests in this docket will be adequately represented by the Consumer Advocate. This fact is consistent with other recent determinations by the Commission.

In Order No. 23097 in Docket No. 2006-0431 (“Power Outage Investigation”), the Commission denied a motion to intervene submitted by Life of the Land (LOL) because the Commission did not find LOL’s interest in that proceeding to be distinct from the general public and found that LOL’s interests would be adequately represented by the Consumer Advocate. In the Power Outage Investigation, LOL asserted that the Consumer Advocate could not represent its interests and that LOL’s interests differ from that of the general public since the Consumer Advocate protects the consumers’ interests while LOL represents environmental interests.<sup>6</sup> The Commission did not find this argument convincing and determined that LOL’s interests in that docket could be adequately represented by the Consumer Advocate.<sup>7</sup>

Similarly, in Docket No. 2008-0115 the Commission recently denied a motion to intervene by the West Molokai Association (WMA) on grounds that the Consumer Advocate would appropriately represent the interests of WMA in the proceeding.<sup>8</sup>

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<sup>6</sup> Order No. 23097 at 9-10.

<sup>7</sup> Id.

<sup>8</sup> Order Denying Motion to Intervene Filed by West Molokai Association, Docket No. 2008-0115 (August 8, 2008)(2008 WL 3856702, Slip Copy).

Through its motion to intervene, WMA attempted to distinguish its interests from those of the Consumer Advocate (which Wal-Mart does not do) as follows:

*[The Consumer Advocate] represents many of the common goals of all parties to this proceeding, namely provision of essential water and wastewater services over the long term at reasonable rates. However, because [the Consumer Advocate] must represent the interests of customers of [Wai'ola], which customers include Mauanaloa [sic], Kualapuu, south Kalae and other adjacent areas in Central and West Molokai, [the Consumer Advocate] must divide its attention in representing WMA's interests. Further, [the Consumer Advocate] neither directly nor indirectly suffers the consequences of a Commission decision adversely impacting consumers. Only WMA has that perspective to offer the Commission. Further, WMA has access to information which will be of assistance to the Commission and to [the Consumer Advocate]<sup>9</sup>.*

The Commission determined:

*WMA's members are essentially utility customers of MPU and Mosco. Pursuant to HRS § 269-51, the Consumer Advocate "shall represent, protect, and advance the interests of all consumers, including small businesses, of utility services" in the State. Thus, the Consumer Advocate is statutorily mandated to represent the interests of WMA's members in this docket, and will do so in this docket<sup>10</sup>.*

Finding that the Consumer Advocate will appropriately represent the interests of HECO customers in this proceeding, including Wal-Mart, is also consistent with the "just, speedy and inexpensive determination of every proceeding," which is the purpose of the Commission's Rules of Practice and Procedure as stated in H.A.R. §6-61-1.

In contrast, allowing party intervention on the basis of very general allegations of the sort made by Wal-Mart would set a poor precedent. Allowing every entity that is a customer of a utility to intervene is not reasonable, would be contrary to the Legislature's intent

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<sup>9</sup> 2008 WL 3856702, Slip Copy at 2.

<sup>10</sup> 2008 WL 3856702, Slip Copy at 3.

that the Consumer Advocate represent the interests of utility consumers, and would not result in the “just, speedy and inexpensive determination of every proceeding.”

**B. Wal-Mart Has Not Shown That Its Participation Would Assist in the Development of a Sound Record Regarding the Reasonableness of HECO’s Proposed Rate Increase.**

Wal-Mart alleges that its participation “will contribute to the production of complete and accurate discovery and to the development of a sound record.” (Motion at 3) Wal-Mart also alleges that its participation “will enable the Commission to view and consider more relevant and pertinent information than it would otherwise.” (Id.) However, beyond these broad allegations, Wal-Mart does not demonstrate or provide any evidence regarding how its participation would assist in the development of a sound record regarding HECO’s revenues, expenses, rate base and rate of return, and reasonableness of the proposed rate increase. Moreover, Wal-Mart has not provided any evidence that it has experience in utility rate case proceedings or can bring information or expertise to the proceeding which the Commission would not otherwise have without Wal-Mart’s participation. As a key example, Wal-Mart does not indicate in any way how it will “ensure that the rate design and implementation of any rate increase adopted in this docket is distributed fairly across all customer classes” (Motion at 3) any better or differently than the Consumer Advocate.

**C. Wal-Mart’s Participation Could Unduly Delay the Proceedings and Unreasonably Broaden the Issues.**

As discussed above, H.A.R. §6-61-55(d) expressly provides that “[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not



unreasonably broaden the issues already presented." (Emphasis supplied).<sup>11</sup> Notably, Wal-Mart makes no attempt to allege or represent to the Commission that its participation will not unreasonably broaden the issues already presented in this docket. Rather, Wal-Mart states that "[i]t is not unlikely that Wal-Mart's position may be different from those advocated by HECO, the Consumer Advocate, or any other party to the instant proceeding." (Motion at 3) At best, it is not possible for the Commission to determine, based upon the information provided in Wal-Mart's Motion, whether Wal-Mart's participation will unreasonably broaden the issues. Wal-Mart has not met its burden under the standard set forth in the Commission's Rules for intervention as a party and accordingly, its Motion should be denied.

## **II. WAL-MART'S MOTION TO APPEAR**

Wal-Mart filed a Motion to Appear on behalf of Wal-Mart concurrently with its Motion. As there is no basis to allow Wal-Mart's intervention as a party in this proceeding, Wal-Mart's Motion to Appear should be denied as moot.

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<sup>11</sup>

Re Hawaii Electric Light Co., Docket No. 7259, Order No. 12893 (December 2, 1993).

### III. CONCLUSION

Based upon the foregoing, HECO respectfully requests that the Commission deny Wal-Mart's Motion to Intervene and Become a Party and Wal-Mart's Motion to Appear.

DATED: Honolulu, Hawaii, August 27, 2008

Respectfully Submitted,

HAWAIIAN ELECTRIC COMPANY, INC.



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Kevin Katsura

Attorney for:

HAWAIIAN ELECTRIC COMPANY, INC.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the foregoing  
MEMORANDUM IN OPPOSITION TO THE MOTION TO INTERVENE AND  
BECOME A PARTY OF WAL-MART STORES, INC. AND SAM'S WEST, INC.,  
AND MOTION TO APPEAR ON BEHALF OF WAL-MART STORES, INC. AND  
SAM'S WEST, INC., upon the following parties, by causing a copy hereof to be mailed,  
postage prepaid, and properly addressed to each such party.

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DATED: August 27, 2008

